92-1409

Supreme Court, U.S.
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No. .....

In the Supreme Court
OF THE
United States

Myron Curtis Gackenbach, Esq.
Petitioner

vs.

Uniroyal, Inc.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the action of the Court below in granting the motion of summary judgement based upon the facts in this case so unconscionable and egregious so as to be unconstitutional?
2. Was the Petitioner, Myron C. Gackenbach, Esq., deprived of his constitutional right to a full and fair trial by a fair and impartial tribunal?
3. Should a District Magistrate arbitrarily and without a hearing prevent Petitioner Gackenbach from a jury trial on the facts?
4. Should Uniroyal, Inc. be excused and not be held liable to pay Petitioner Gackenbach a $134,000 finder/ brokers fee arising from an earlier written contract stating a limited time of 24 months for the acquisition of Kalo when Uniroyal had total control as to the amount of time it took to complete acquisition of Kalo. This is particularly egregious when Uniroyal orally modified the contract with Petitioner to extend beyond 24 months?

LIST OF ALL PARTIES

The parties ot this action are Myron C. Gackenbach, Esq., an individual, and Uniroyal, Inc. a corporation, the parties listed in the caption.

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IN THE SUPREME COURT

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Myron Curtis Gackenbach, Esq.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATED COURT OF APPEALS FOR THE THIRD CIRCUIT

Petition, Myron C. Gackenbach, Esq., respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Third Circuit affirming the Sumary Judgement of the District Court is attached hereto as Appendix "A". The District Court's Judgement appears as Appendix "B".

JURISDICTION

Jurisdiction was based on diversity of citizenship after consideration by a panel. A hearing was rendered by the Third Circuit. A time of petition for rehearing was made. This Petition is filed within the 90 days allowed. The Third Circuit denied rehearing on November 9, 1992. This Petition is filed within the 90 days allowed by 28 U.S.C. Section 2101.

STATEMENT OF THE CASE

The Petitioner, Myron Curtis Gackenbach, Esq., is an attorney duly licensed to practice law in the Commonwealth of Pennsylvania. Not only is the Petitioner an attorney, he is a leading authority on corporate acquisitions. He is an expert on corporate mergers and acquisitions and an author and writer of articles on corporate acquisitions. An example of his expertise in the field appears in Channel Magazine, a publication of the International Semi-Conductor Association. A copy of said article is attached to the Statement of the Case as Appendix "C". As indicated in the article, Mr. Gackenbach

conducts his finders and consulting business under the name of Chemical Markets and Investment Company. The principal activity of Petitioner's company is identifying potential businesses for corporate acquisition. This particular activity is one which requires a great deal of expertise, experience, and a sophisticated knowledge of the needs of a particular corporation for acquisition.

Sometime prior to December of 1983, the Petitioner correctly concluded that Kalo, a Kansas City concern engaged in the production of Rhizobim inoculates as well as soil nutrient compounds would be an excellent candidate for acquisition. At the time the Petitioner, through his expertise, reached this conclusion, Uniroyal, Inc. had no knowledge that Kalo was indeed available for acquisition. This vital information was known only by the Petitioner. Because of his reputation as a finder/ consultant in the specialty chemical

industry. Uniroyal, initially contacted the Petitioner requesting his services and assistance to locate attractive specialty chemical companies which Uniroyal could acquire. Sometime prior to January 26, 1984, Uniroyal prepared, at its office, a Finder's Fee Agreement which is the subject of this litigation. In May of 1984, the Petitioner returned to Uniroyal the subject agreement along with his letter indicating Kalo as one of the prospective acquisition candidates. Uniroyal then notified the Petitioner on May 21, 1984, that Kalowas covered by the Finder's Fee Agreement specifying that a finder's fee was to be paid to Petitioner Gackenbach if Uniroyal acquired Kalo or any part of Kalo.

In effect, as of May 21, 1984, there was an agreement between Petitioner and Uniroyal that if it acquired Kalo or any part of Kalo that it would pay the Petitioner Gackenbach the Lehman Formula fee which in this instance proved to be in excess of $134,000.00.

Uniroyal then prevented Petitoner from arranging the initial acquisition negotiating meeting between the owners of Kalo and Uniroyal for a period of in excess of nine months. Permission by Uniroyal was finally given to Petitioner Gackenbach to arragne an initial acquisition negotiating meeting between the owners of Kalo and Uniroyal and this meeting led ultimately to the decision by Uniroyal to purchase Kalo's seed treatment business.

Slightly more than one month after the meeting, the confidential disclosure statement, which is always the first step towards acquisition was prepared by Uniroyal and forwarded by Uniroyal to Kalo and promptly executed by Kalo.

After March of 1985, the result of the introduction by Petitioner Gackenbach of Kalo to Uniroyal, everything was in place for the acqisition of Kalo by Uniroyal.

Your Petitioner averred in his complaints and his affadavits that after the successful

and his affadavits that after the successful February meeting between the principals and after the disclosure statement had been forwarded by Uniroyal to Kalo, Uniroyal representatives intentionally misled the Petitioner Gackenbach in advising him that there was no interest in the acquisition by Uniroyal of Kalo when in fact it is clear from the record, including the forwarding of the confidential disclosure statement and immediate subsequent negotiations, that Uniroyal had a strong interest in the acquisition of Kalo and that acquisition negotiations were moving along internally.

Uniroyal representatives intentionally misled Petitioner Gackenbach by indicating there were no ongoing negotiations between Kalo and Uniroyal when in fact there were.

Petitioner Gackenbach, who trusted Uniroyal representatives, indicated under oath and in his affadavit that during the 24 month period, Mr Kleinfeld, a duly authorized agent and employee of Uniroyal assured Peti-

tioner Gackenbach that his finder/ broker's fee would be paid in full by Uniroyal if Uniroyal acquired Kalo after the 24 month period. Based upon these assurances, the Petitioner who knew of other companies who would also be interested in purchasing Kalo did nothing to introduce Kalo to these other companies.

At any time, the Petitioner could have introduced Kalo to numerous other larger companied, but because he was protected by the oral assurances given by the representatives of Uniroyal, he did not introduce Kalo as an attractive acquisition to other large corporations. The Petitioner relied upon Uniroyal's statement that he would be protected regardless of the date of acquisition and he withheld identifying Kalo as an acquisition candidate to other acquiring corporations. This forebearance amounted to additional consideration by Petitioner Gackenbach and clearly brought the herein matter out of any statute of frauds.

Subsequently, Uniroyal did acquire a por-

tion of Kalo and your Petitioner Gackenbach was clearly entitled to his finder's/ broker's fee pursuant to the agreement of the parties as modified by Uniroyal representatives.

REASONS FOR GRANTING THE WRIT

I.

The Right To A Trial Is Guaranteed By The Constitution.

Any attempt to abrogate an individual's right to his trial by jury is strictly proscribed by the Constitution. The motion for summary judgment which was granted by the court in this factual scenario clearly is in violation of the Constitution which guarantees the right of a trial by jury. There are questions of fact which a jury has a right to determine. It should not be within the province of a District Magistrate to become the sole trier of fact without a hearing as was done in the instant case. There was justifiable reliance on the statements of Mr. Kleinfeld and therefore, the motion for summary judgment clearly should not have been

granted. For the reasons stated, the Constitutional rights of the Petitioner were abrogated in violation of the U.S. Constitution.

This consideration, along with the fact that Uniroyal waited nine months following the signing of the agreement before permitting the Petitioner Gackenbach to arrange the initial meeting is further evidence of the deprivation of the Petitioner's Constitutional rights in not being afforded a full and fair trial.

The Petitioner was unilaterally deprived of his constitutional rights in that he did not enjoy the protection of the due process clause as mandated by the United States Constitution. The due process clause requires a full and fair trial before a fair or impartial tribunal.

The facts in this case clearly reveal that the full and fair trial mandated by the United States Constitution by a fair and impartial tribunal was not afforded to the Petitioner Gackenbach.

In support of this position, this Court is

respectfully directed to the following cases: The West Penn Power Company vs. Train, (1975) 522 Fed. 2nd 302 Certiori denied 96 U.S. Supreme Ct., 3165 and Comm. Human Relations Commission vs.Thorp, Reed & Armstrong, 361 A. 2nd 497, 25 PA Comm. 295 (1976). The substance of these cases are on the same issues as Petitioner Gackenbach in his action against Uniroyal and explicitly support this position.

Moreover, the Courts below correctly cited the applicable New York Law as it relates to exceptions to the rule prohibiting oral modification, yet the Courts below failed to apply the exception when the facts in the case clearly reveal the exception was applicable. (See Towers Charter, 894 F.2d at 522 and Rose v. Spa Realty Assocs., 42 N.Y.2d 338, 343, 397 N.Y.S.2d 922, 926, 366 N.E.2d 1279, 1283 (1977).

II.

The Decision Of The Court In Depriving The Petitioner Of His Fee Is So Uncon-

scionable That It Is Unconstitutional.

A review of the facts in this case clearly reveal that there was an improper granting of a Motion for Summary Judgment. This grant not only violated the due process clause of the United States Constitution, but was blatantly unconscionable. It is unconscionable that the Petitioner should be deprived of his $134,000.00 broker's fee given the facts of this case.

It is necessary to review the underlying facts of this case and apply Constitutional principles to those facts. Several unrefuted facts should be considered by this Court.

A. The Petitioner was never afforded the right to see a judge during this discovery period.

B. Uniroyal would not have acquired Kalo but for the services provided by Mr. Gackenbach. He was the critical element in this acquisition by his initial disclosure and support services thereafter.

C. Kalo was covered by the finder's fee

agreement from Uniroyal to Gackenbach.

D. The Petitioner, while not required to do so in carrying out his duties as a finder/ broker, did everything he could do in urging Uniroyal and Kalo to move forward with the expedition in consummating the acquisition.

E. This contact included inter alia the scheduling of meetings between the principal owners of Kalo and Uniroyal executives in Kansas City.

F. Petitioner Gackenbach also provided additional corporate and industry information on Kalo and the industry it served and its products to Uniroyal following its disclosure to Uniroyal as being available for acquisition and thereby incurring substantial expenses.

G. The initial meeting between the principal owners of Kalo and Uniroyal was intentionally delayed at least nine months by the unconscionable conduct of Uniroyal after the execution of the agreement.

The actions of Uniroyal delayed the meeting and the final acquisition of the Kalo buy

out beyond the 24 months stated in the original unmodified written contract between Uniroyal and the Petitioner Gackenbach. Without the information and services provided by the Petitioner, Uniroyal would not have acquired Kalo.

Uniroyal had total control for the amount of time Uniroyal took to complete the acquisition and was totally within its discretion, despite the Petitioner's persistent attempts to expedite the completion of the contract. Uniroyal intentionally delayed the completion of the acquisition beyond the 24 months as stated in the original unmodified contract to Petitioner Gackenbach.

Uniroyal unconscionably bases its defense on the fact that Kalo was acquired several months beyond the arbitrary 24 month period os set forth in the original written contract, however, members of Uniroyal management orally modified this written agreement as to the time it took to complete the contract.

The Petitioner should not be penalized for

the delay of Uniroyal in completing the acquisition of Kalo simply because it took more than the 24 months as stated in the original contract and Uniroyal was the cause of the delay.

If the contract had not been modified as clearly indicated by the Petitioner, then in all logic and common sense Petitioner Gackenbach would have continued to attempt to have Kalo acquired by another potential buyer. After the modifications, it was in Petitioner Gackenbach's best interest to remain loyal to Unirooyal, which he did, and not contact other acquiring companies who would have purchased Kalo.

Since it is clear from the Petitioner's affadavit and from the pleadings in this case that the contract was modified, the Petitioner's fee was not in peril even after the 24 month period had passed and he did exactly what he should have done because the contract was modified. He did not seek to find another buyer for Kalo because he was pro-

tected under the Uniroyal contract.

Notwithstanding the fact that it is clear that the Petitioner's only role in this agreement was introducing the parties to each other, the record is replete with other service and actions which he undertook to persuade Uniroyal to acquire Kalo and those actions include, but were not limited to, his scheduling of the meetings of the principals after the long nine month delay occasioned by the conduct of Uniroyal and supplying to Uniroyal of corporate information on Kalo and its products and the industry it serves.

The record also reveals that the Petitioner was also engaged in an active on-going activity involving the gathering of valuable information relating to the industry for both Uniroyal and Kalo for which Petitioner Gackenbach incurred substantial expenses. This information also helped to further the acquisition of Kalo by Uniroyal. The Petitioner repeatedly urged both sides to expedite the acquisition.

Equitable estoppel is a time honored basis for legal reasoning. It prevents unconscionable results. The equitable estoppel argument as set forth by the Petitioner in the court below should have been applied by the court. Because the Petitioner lost the tremendous opportunity to be a broker in the acquisition of Kalo by another party, Uniroyal should be estopped under these circumstances from utilizing as a defense the statute of frauds arguing that there can be no oral modification of an agreement when Uniroyal intentionally delayed that acquisiton beyond the 24 months.

In fact, there was an oral modification of agreement. That fact is clear from the affadavit of the Petitioner. In fact, the Petitioner substantially changed his position by not introducing Kalo to other potential buyers. The jury could reasonably believe that the conduct on the part of the Petitioner was caused solely by the statements of Uniroyal that his fee would be protected regardless of

the date of acquisition.

It is clear that the constitutional rights of the Petitioner were violated by not giving him his day in court. Justice and equity in the law requires nothing less than a remand of this case for the purpose of a full trial on the facts.

Even if there had been no oral modification of this contract, the Petitioner should have been compensated because he incurred substantial expenses and performed all the services by the disclosure of Kalo and arranged the meetings of the principals and gathered the factual information which both sides acted upon. The consummation of this transaction was caused solely by the introduction and support services by the Petitioner Gackenbach. The Petitioner had, however, no control over the amount of time Uniroyal took to complete the acquisition. The time schedule for this acquisition was to be determined entirely by Uniroyal.

The basic unfairness and unconscionability

of the results reached by the Court on this case should lead, without question, to a remand by this court for a trial.

Please note Petitioner's article as a professional expert on corporate mergers and acquisitions which he completed for the International Semi-Conductor Producer's Association. In this excellent article are indicated the professional credentials of Petitioner Gackenbach stating his association in past years with distinguished Wall Street investment banking firms where he worked as an industry specialist and his membership in the professional merger and acquisition industry associations including the New York Society Security Analysts, the Association for Corporate Growth, and numerous chemical industry associations.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 92-1257

MYRON CURTIS GACKENBACH, Appellant

v.

UNIROYAL, INC., Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 90-02544)

District Judge: Hon. William H. Yohn, Jr.

Submitted Under Third Circuit Rule 12(6)

September 22, 1992

Before: HUTCHINSON, ALITO, and SEITZ, Circuit Judges

(opinion Filed: October 14, 1992)

MEMORANDUM OPINION OF THE COURT

ALITO, Circuit Judge:

The plaintiffs an attorney who also does business as a consultant to enterprises interested in mergers or acquisitions in the chemical industry. In his latter capacity, he entered into a contract in May of 1984 with the defendant's predecessor in interest (which we will also call simply "Uniroyal," for convenience). Under this contract, Uniroyal agreed, in return for Gackenbach's identification of Kalo, Inc. to Uniroyal as a potential acquisition, that Uniroyal would pay Gackenbach a finder's fee (to be calculated according to a specified formula) if Uniroyal, or a subsidiary of Uniroyal, acquired Kalo in whole or in part within 24 months after the date of the contract. This contract was in writing and contained a provision explicitly stating that no subsequent "change, waiver, modification, alteration, or addition" would be binding unless it was also in writing.

A Uniroyal subsidiary eventually acquired a product line from Kalo in December of 1986, more than 24 months after the Gackenbach-Uniroyal contract was signed. Gackenbach alleges that he had a telephone conversation within the

24 month period with Martin Kleinfeld, a Uniroyal officer, during which Kleinfeld assured him that Uniroyal would pay him the finder's fee even if the acquisition took place after the 24 month period had expired. Uniroyal denies that this conversation took place. Gackenbach further alleges that, in reliance on Kleinfeld's representations, he refrained from taking affirmative steps either to cause the Uniroyal-Kalo deal to be consummated within the 24 month period or to find another purchaser for Kalo who would pay him a finder's fee.

Once Gackenbach learned that Uniroyal's subsidiary had in fact acquired a portion of Kalo, he requested that Uniroyal pay him his finder's fee. Uniroyal refused. Gackenbach then brought this action into the District Court, with jurisdiction based on diversity of citizenship. Both parties agree that the law of New York, specified by a choice-of-law provision in the 1984 contract, governs the case.

In the District Court, Uniroyal moved for summary judgment, which the District Court granted. The District Court essentially held that 1) Uniroyal's refusal to pay Gackenbach a finder's

fee was not a breach of the contract as originally written; 2) there was no evidence sufficient to support a jury finding that Uniroyal had decided to consummate the Kalo acquisition before the 24 months had expired and then deliberately delayed the transaction in order to avoid payment of the finder's fee; 3) unless Uniroyal were estopped from relying on it, the applicable Statute of Frauds, N.Y. Gen. Oblig. Law § 15-301, prevented the purported oral modification of the contract by the Gackenbach-Kleinfeld telephone conversation from having any legal effect on the parties' rights and obligations under the contract;[1] 4) and there was no evidence sufficient to support a jury finding of the facts necessary to permit Gackenbach to estop Uniroyal from raising the Statute of Frauds defense. Gackenbach filed a timely notice of appeal.

We fully agree with what we have characterized as the first, second, and third of the District

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1. Again, Uniroyal strenuously denies that any such oral modification was made. For purposes of the district court's grant of summary judgement, and our review of that decision, we must of course assume Gackenbach's version of events to be true.

Court's holdings and do not believe they require any discussion. We therefore confine our discussion to the estoppel issue.

Gackenbach argues that the district court erred in holding that the case was governed by "promissory estoppel," which apparently requires a showing of "unconscionability" (i.e., that estoppel is necessary to prevent an unconscionable result) in order to be appropriate. He argues instead for the applicability of "equitable estoppel," which under New York law requires a less demanding showing of 'significant and substantial reliance" on the representations of the party to be estopped. Both parties have cited New York case law on this issue.

We conclude that we need not resolve this argument. Even if Gackenbach is correct, the New York case law clearly shows that the "significant and substantial reliance" must be "unequivocally referable" to the oral modification. This means that " conduct relied upon to establish estoppel must not otherwise be compatible with the agreement as [originally] written." Rose v. Spa Realty Associates, 366 N.E.2d 1279, 1283 (N.Y. 1977). The district court found that, on

the record at the time of the summary judgment motion, no reasonable jury could conclude that Gackenbach's purported reliance (which consisted exclusively of forebearance from acting) was unequivocally referable to the alleged modification. Appellant's Brief at 34-35. We have thoroughly reviewed the record, and we agree. It would not have been per se unreasonable or illogical for someone in Gackenbach's position, but under the subjective belief that the contract as originally written governed the situation, to have done what Gackenbach did, i.e., nothing. That would have meant accepting the fact that a particular deal had not worked out as hoped, but that would not have been objectively unreasonable under the circumstances. Anyone engaged in Gackenbach's trade, that of a broker or finder, undoubtedly must expect some percentage of the potential deals he invests time and effort in promoting never to be consummated, or never to be consummated under circumstances entitling the middleman to a fee. Therefore, no jury could reasonably find Gackenbach's forebearance fron action "not otherwise compatible with the agreement as writtin." Rose v. Spa Realty Associates, 366

N.E.2d at 1283.

In his reply brief in this court, Gackenbach, apparently for the first time, attepmts to characterize Uniroyal's alleged oral representations to him as constituting a waiver of a particular provision of the contract rather than as a modification, with the consequence that a diferent legal standard, more favorable to him, would apply to the Statute of Frauds issue. We do not think that this argument is properly before us. In any event, if this issue were before us, it appears that to the extent there is a subtle difference between a modification and a waiver, the record viewed most favorably to Gackenbach shows a modification rather than a waiver.

In conclusion, the district court held that Uniroyal was not estopped from raising the Statute of Frauds defense, and that once the Statute of Frauds defense was raised, Uniroyal was entitled, on the record, to summary judgment. For the reasons given above, we agree and affirm the district court's entry of judgment in favor of Uniroyal.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Memorandum Opinion.

Circuit Judge

DATED: October 14, 1992

Filed March 6, 1992

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

MYRON CURTIS GACKENBACH	:	CIVIL ACTION
	:	90-2544
v.	:	
	:	
UNIROYAL, INC.	:	

MEMORANDUM

Yohn, J. March 5, 1992

Now before the court is defendant Uniroyal, Inc.'s motion for summary judgment. For the reasons set forth below, the motion will be granted.

BACKGROUND

The plaintiff, Myron Gackenbach, is a practicing attorney with approximately twenty years of legal experience. In addition to his law practice, plaintiff also engages in business on a part-time basis as a "finder" trading under the name Chemical Markets and Investments Company

["Chemical Markets"]. The principal activity of Chemical Markets, a member of the Association for Corporate Growth and the New York Society of Security Analysis, is identifying potential targets for corporate acquisiton. Amended Complaint ¶ 4.

In December 1983, plaintiff learned that Uniroyal, Inc. ["Uniroyal" or "Company"] was interested in expanding its specialty agricultural chemical operations and communicated his interest in working with the Company to identify potential acquisitions.[1] Uniroyal responded to plaintiff's overture on January 26, 1984 with a proposed Finder's Fee Agreement ["Agreement"] pursuant to which plaintiff would provide services as a finder. Def's. Motion for Summary Judgment, Ex. A. Plaintiff signed the Agreement and returned it to Uniroyal on May 9, 1984 along with a letter of transmittal disclosing six companies as potential Uniroyal acquisitions. Id., Ex. B. One of the prospects identified in the letter was Kalo Co., a Kansas City concern engaged

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1 Uniroyal Inc. was liquidated in 1986. Respondent Uniroyal Chemical Inc., although not a successor in interest to Uniroyal, Inc., has stipulated that it will defend against and satisfy any judgment rendered against Uniroyal, Inc. in this case. Pretrial Report-Order, at ¶ 8.

in the production of Rhizobium inoculants as well as seed treating compounds. On May 21, 1984, Uniroyal returned to plaintiff a fully executed copy of the Agreement along woth a letter indicating that the Kalo Co. was of potential interest and would be covered by the terms of the Agreement.[2] Affidavit in Support of Pl's. Memorandum of Law, Ex. D ["Affidavit"].

Under the terms of the agreement, plaintiff was entitled to a finder's fee

> [i]n the event that Uniroyal, as a direct result of information provided to it in a Notice of Prospect, shall consummate the acquisition of a Prospect within twenty-four months after the date of the Notice of Prospect in which such Prospect was disclosed to Uniroyal.

Def's Motion for Summary Judgement, Ex. A ¶ 3 (emphasis added). The Agreement also contained a provision stating that

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2 Under the trems of the Agreement, plaintiff was to identify potential acquisitions to Uniroyal by means of a "notice of Prospect." The parties do not dispute that the May 9, 1984 letter as a "Notice of Prospect" with respect to Kalo.

> [t]his Agreement constitutes the entire agreement between the parties relating to the subject matter hereof, and no prior or concurrent representation, understanding or agreement whether written or oral, shall bind either party hereto in respect of the subject matter hereof. No change, waiver, modification, alteration, or addition to any provision hereof shall be binding unless in writing and signed by the designated representative of both parties.

Id. at ¶ 8.

After learning of Uniroyal's interest in the Kalo Co., plaintiff agreed to supply basic financial and sales information as well as product and market data on Kalo. In addition, plaintiff arranged a meeting between the principals of Kalo and representatives of Uniroyal which took place on February 8, 1985. Affidavit, Ex. F. Prior to the February 5 meeting, plaintiff advised Kalo's officers that Uniroyal was particularly interested in how their company's operations might complement those of Gustafson, Inc., a Uniroyal subsidiary. Affidavit, Ex. G.

In an internal memo dated February 11, 1985, the manager of corporate development for Uniroyal indicated that while Kalo was an attractive acquisition, the asking price was steep. Affidavit, Ex. H. Although it is unclear from the record now

before the court whether active negotiations for the acquisition of Kalo continued throughout 1985, plaintiff has testified that sometime between October 24, 1986 and December 3, 1986, a decision was made that Gustafson, Inc. would acquire Kalo's seed treatment business. Def's. Motion for Sumary Judgment, Ex. C, Dep. Tr. at 66. An Asset Purchase Agreement, consummating the sale was executed on December 3, 1986. Def's. Motion for Summary Judgment, Ex. C.

Notwithstanding the fact that the acquisition of Kalo Company's seed treatment business by a Uniroyal subsidiary was consummated 31 months after Kalo was identified as a potential target in a Notice of Prospect, plaintiff nonetheless claims he is entitled to a finder's fee. In response to Uniroyal's refusal to pay the fee, plaintiff initiated this action claiming breach of contract and seeking damages of approximately $134,960. Pl's. Memorandum of Law in Opposition to Def's. Motion for Summary Judgment, at 3. Plaintiff bases his claim upon an alleged oral modification to the Agreement pursuant to which he was promised that the finder's fee would be paid even if the acquisition of Kalo was not consummated within

the 24 month period established in the Agreement. Affidavit, at ¶ 28.

Defendant Uniroyal denies any such oral modification of the Agreement in connection with the Kalo transaction. In addition, defendant points out that even if it had undertaken to enter into an oral modification it would be ineffective to the extent that the Agreement expressly requires any modification to be in a writing signed by both parties. Consequently, defendant urges, summary judgment in its favor is appropriate not only because the Kalo transaction was not consummated within the 24 month period as required by the Agreement, but also because the oral modification upon which plaintiff bases his claim is expressly prohibited by the terms of the Agreement. The court concludes that an oral modification, if any, to award the finder's fee in connection with a transaction consummated beyond the 24 month period set out in the Agreement is ineffective under the circumstances presented by this case. We express no opinion on defendant's argument that under New York law a finder's fee agreement may not be modified orally under any set of facts.

The parties agree that pursuant to the terms of the Agreement, New York law controls this dispute.

DISCUSSION

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A fact is material if it has the potential to affect the outcome of the action under the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The court is required, in resolving a motion for summary judgment, to determine whether the evidence is such that a reasonable jury could return a verdict in favor of the non-moving party. Id. The party moving for summary judgment bears the initial burden of identifying those portions of the record that it believes demonstrate the absence of disputed material facts. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). To avoid summary judgment, the non-moving party

must establish the existence of a genuine issue for trial, id. at 321, n.3, and must demonstrate the existence of evidence sufficient to support a jury finding in its favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). In ruling on a motion for summary judgment, the court must consider the evidence in the light most favorable to the non-moving party, United States v. Diebold, Inc., 369 U.S. 654, 655 (1962), must give that party the benefit of all reasonable inference arising from the evidence, Tigg Corp. v. Dow Corning Corp., 822 F.2d 358, 361 (3d Cir. 1987), and must accept as true all allegations of the non-moving party. Anderson, 477 U.S. at 255.

Under New York law, "[a] written agreement...which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought." N.Y.Gen.Oblig. Law § 15-301(1) (McKiney 1991). In general, therefore, a written agreement that expressly states it can be modified only in writing cannot be modified orally. Towers Charter & Marine v. Cadillac Ins. Co.,

894 F.2d 516, 522 (2d Cir. 1990), and such oral modification is deemed to be presumptively unenforceable.

Despite a reluctance to vary the terms of a written agreement, court interpreting New York law have consistently recognized two exceptions to the general rule prohibiting oral modifications where the agreement requires a writing. First, an oral modification may be enforced when there has been partial performance of the agreement to modify, as long as the performance is "unequivocally referable to the oral modification." Towers Charter, 894 F.2d at 522, citing Rose v. Spa Realty Assocs., 42 N.Y.2d 338, 343, 397 N.Y.S.2d 922, 926, 366 N.E.2d 1279, 1283 (1977).

Second, a party may be estopped from invoking the requirement that any modification be in writing when the other party has been induced to rely upon an alleged oral modification. Towers Charter, 894 F.2d at 522. Similar to the exception based upon partial performance, for estoppel to apply the conduct claimed to have resulted from the oral modification must be unequivocally referable to the modification. In addition, for either exception to apply, the conduct premised

upon the oral modification must be inconsistent with the agreement as written. Id.

Under the terms of the Agreement between plaintiff and Uniroyal, the finder's fee was due and owing only if the acqusition of a potential target was consummated within 24 months of the date upon which the target was identified by plaintiff in Notice of Prospect. There is no dispute that Kalo Company was identified as a potential prospect on May 9, 1984 and that the acquisition of Kalo by Gustafson, Inc. was consummated pursuant to the terms of an Asset Purchase Agreement on December 3, 1986. Similarly, it is undisputed that there exists no written modification of the Agreement respecting the requirement that a deal close within 24 months as a prerequisite to payment of a finder's fee.[3]

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3 During a deposition of plaintiff by defendant's counsel, the following exchange took place.

Q. Did you call him [Mr. Kleinfeld, Manager of Aquisitions & Divestitures for Uniroyal] or did he call you?

A. On this subject I think I called him, or it may have come up in a conversation where he called me. I just know there existed a phone conversation between

Plaintiff alleges that in reliance upon the oral assurance that he would receive the finder's fee even if the acquisition of Kalo was not consummated within 24 months he refrained from taking any steps to expedite the acquisition and similarly refrained from disclosing to other potential buyers the fact that Kalo Company was available for acquisition. Affidavit, at ¶ 29. Consequently,

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> Kleinfeld and myself on the subject will I get paid if you consummate this acquisition after the 24-month date in my contract. He says you brought it up, you put it on track, you'll get paid.
>
> Q. Okay. You remember that?
>
> A. Yes, I do.
>
> Q. Okay. And that was a -- did you make any notes of that?
>
> A. I didn't need to.
>
> Q. Okay. Were there any writings on that?
>
> A. I felt comfortable.
>
> Q. Was there any writing on that?
>
> A. I don't remember making any notes.

Def's Motion for Summary Judgement, Ex. D, Dep. Tr. at 177-78.

plaintiff argues that Uniroyal should be estopped from enforcing the requirement that any modification of the Agreement be evidenced by a writing. In addition, plaintiff asserts he believes the actual decision to acquire Kalo was made within the 24 month period and that the acquisition would have taken place within that period absent improper delay by Uniroyal. Affidavit, at ¶¶ 30-31.

Despite plaintiff.s efforts to establish detrimental reliance based upon the alleged oral modification, there is not sufficient evidence in the record to support a jury verdict in his favor. For example, plaintiff himself stated in his affidavit that he had no control over the acquisition date. Affidavit at ¶ 28. It is difficult, therefore, to understand the plaintiff's argument that in reliance upon the oral modification he refrained from taking steps to expedite the transaction. Plainly, plaintiff had no power to cause the consummation of the Kalo acquisition to take place within the 24 month period. Even more importantly for present purposes, there is absolutely no evidence of record of any specific actions that would have or could have been taken by plaintiff to expedite the consummation of the transaction, especially in

the view of his own testimony that defendant's decision to make the acquisition was not made until at least October 24, 1986. Moreover, the fact that the plaintiff was unaware until sometime in 1989 that the Kalo transaction had been completed is convincing evidence of his lack of diligence in monitoring the progress of the deal.[4]

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4 The following exchange took place during a deposition of the plaintiff.

> Q. You didn't see anything in the papers [about the Kalo-Gustafson transaction]?
>
> A. When I did see it, I moved forward.
>
> ...
>
> Q. You missed it totally untill 1989?
>
> A. Well, I would have put my claim in a lot earlier if I would have known they did it.
>
> ...
>
> Q. Okay. You missed this one totally, even though you worked on it, right?
>
> A. Well, I missed it until I found it.

Def's Motion for summary Judgment, Ex. D, Dep. Tr. at 187.

Likewise, there is no evidence of record of plaintiff's forebearance in not revealing Kalo's availability to other potential buyers. Plaintiff set forth absolutely no evidence, other than his own conclusory representations, of any specific actions he refrained from undertaking that would be an adequate basis upon which to invoke principles of estoppel. In the first instance, the Agreement between plaintiff and Uniroyal was not exclusive and its terms did not prohibit plaintiff from disclosing to other potential buyers the identity of prospects offered to Uniroyal. Moreover, plaintiff has failed to offer any evidence of missed opportunities to recommend the acquisition of the Kalo Co. to other Chemical Market clients. In any case, as the court noted in Philo Smith & Co. v. USLIFE Corp., 554 F.2d 34, 36 (2d Cir. 1977), "it is difficult to imagine a case in which mere failure to seek an uncertain prospective benefit could ever generate a sufficient level of unconscionability to warrant the application of the doctrine of promissory estoppel."

Plaintiff's assertion that he believes the actual decision to acquire Kalo was made within the 24 month period contradicts his own sworn testimony

to the contrary.[5] Moreover, there is no evidence of record, as plaintiff admitted at argument, to support plaintiff's allegation that Uniroyal engaged in improper delay in consummating the Kalo transaction in an effort to deprive plaintiff of his finder's fee. In addition, such evidence would be of little moment given the express terms of the agreement that required an acquisition to be consummated in order for the finder's fee to become due and owing. Def's. Motion for Summary Judgment, Ex. A. at ¶ 3. Consequently, the court concludes that plaintiff has not engaged to his detriment in a course of conduct that is unequivocally referable to the oral modification. Moreover, plaintiff's conduct was not inconsistent with the Agreement as written, a prerequisite under New York law to the application of estoppel.

Even if the court were to determine that plaintiff had relied to his detriment on the alleged

---

5 Plaintiff testified at his deposition that "[t]he actual decision to make that acquisition [of Kalo] was made sometime between October 24, 1986 and December the 3rd." Def's. Motion for Summary Judgment, Exhibit C, Dep. Tr. at 66.

oral modification, a conclusion plainly not supported by the record, the harm suffered fails to meet the requirement that an act of reliance result in substantial injury. In Philo Smith, a case factually similar to the case now before this court, the Second Circuit Court of Appeals reiterated the rule that "the doctrine of promissory estoppel is properly reserved for that limited class of cases where 'the circumstances are such as to render it unconscionable to deny' the promise upon which the plaintiff has relied....The relatively limited scope of the doctrine is nowhere more evident than in its requirement of substantial injury." Philo Smith, 554 F.2d at 36.[6] Applying this rule to the facts before it, the Philo Smith court ruled that the loss of a finder's fee "is not

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6 The court notes that in Philo Smith, the defendant prevailed on a motion for a directed verdict made after presentation of plaintiff's case at trial. While plaintiff in this case may argue that Philo Smith is, therefore, inapposite in the context of a motion for summary judgment, the court is guided by the principle that "[T]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a)" Celotex, 477 U.S. at 324, citing Anderson v. Liberty Lobby, 477 U.S. at 250.

the kind of injury contemplated [as substantial] by New York law." Id. Not unlike the Philo court's conclusion respecting the loss of a finder's fee, this court concludes that plaintiff has failed to allege a substantial injury and, therefore, it would not be unconscionable to deny relief.

Finally, the court finds it peculiar that a practicing attorney with 20 years of experience would find it necessary to rely upon an alleged oral modification of an Agreement that by its terms expressly prohibited such a modification to recover on his own behalf a disputed finder's fee. Plaintiff was aware of and agreed to the terms of an Agreement, negotiated at arm's length, pursuant to which the parties contemplated the execution of sophisticated business transactions. Consequently, plaintiff will not be heard to complain that defendant now insists upon enforcement of the terms of the Agreement.

CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment will be granted. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MYRON CURTIS GACKENBACH	:	CIVIL ACTION
	:	90-2544
v.	:	
	:	
UNIROYAL, INC.	:	

ORDER

AND NOW, this 5th day of March, 1992, after hearing argument by the parties, and upon consideration of defendant's motion for summary judgment, plaintiff's opposition thereto and defendant's reply, IT IS HEREBY ORDERED THAT DEFENDANT'S MOTION IS GRANTED and judgment is entered in favor of the defendant, Uniroyal, Inc. and against the plaintiff, Myron Curtis Gackenbach.

/s/ William H. Yohn, Jr.
William H. Yohn, Jr., J.

entered 3-6-92

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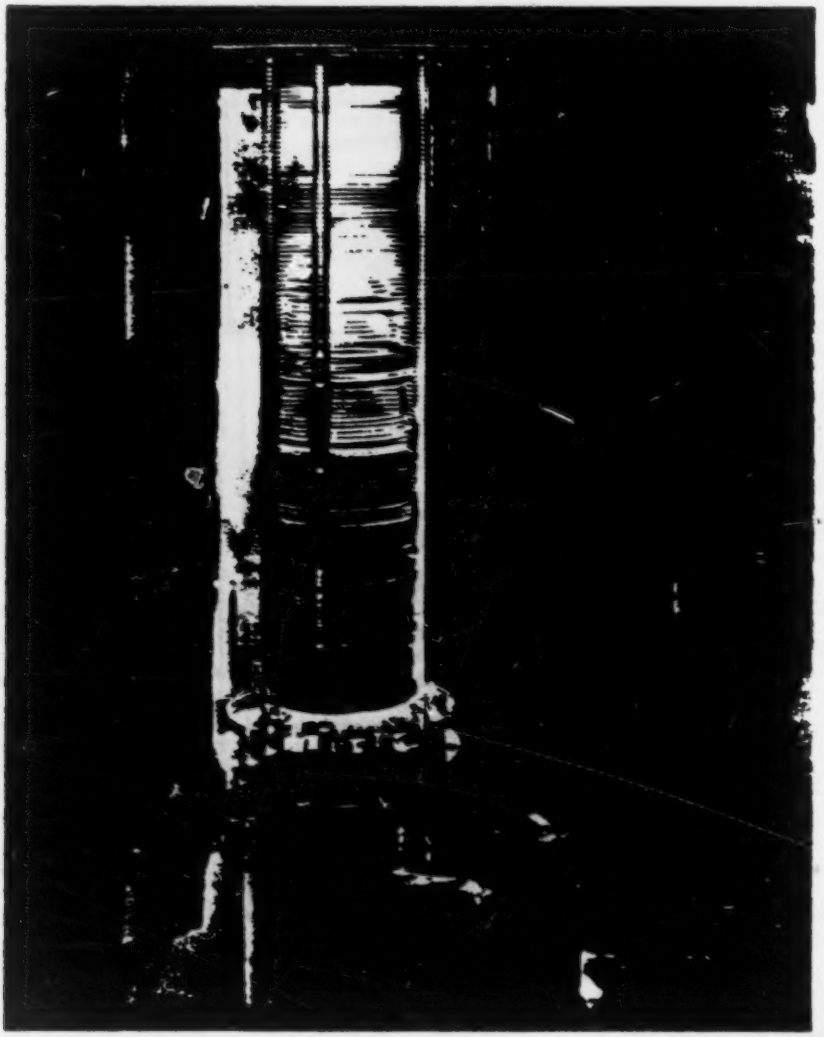

The Consortium Craze

Playing the Mergers and Acquisitions Game

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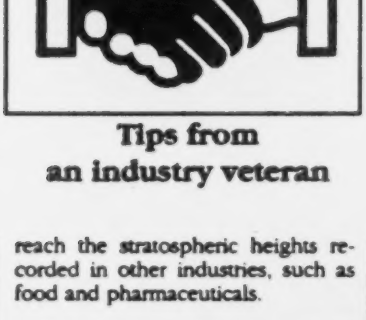
Playing the Mergers and Acquisitions Game



Tips from an industry veteran

By Myron C. Gackenbach

The development of "niche processes" has created a boom market for mergers and acquisitions in the semiconductor equipment and materials industry. In recent years Olin, Dupont, Union Carbide, Dexter Hysol, General Signal, Eaton and Morton Thiokol have been active in the hunt for such niche businesses.

More mergers and acquisitions loom ahead. Analysts predict opportunities in a broad range of companies that manufacture: packaging and testing equipment, sensors, specialty coatings and adhesives, mask-making materials, inspection systems, insulating materials, and wafer processing and fabrication equipment.

Why are companies in this industry targeted for acquisition? A look at the balance sheet often tells the tale. Under-capitalization—caused in part by a fragmented marketing strategy, competitive pressures and new product development costs—is the primary villain.

Although the cost of acquiring an equipment or materials company has jumped in recent months, it has yet to reach the stratospheric heights recorded in other industries, such as food and pharmaceuticals.

Determining a fair cost for an equipment/materials company has its own peculiarities. The business world's most common measures, such as sales to asset ratios or book values per share, are overshadowed by a number of technical issues. A "fair price" in this industry is often determined by patent positions, incremental sales and earnings growth and perceived market acceptance.

One statistical measure that is scrutinized, however, is price times earnings ratios. When evaluating a target company, suitors should look for P/E multiples of approximately 15 times earnings. There should ideally be five consecutive years of incremental net earnings growth of 10 percent or better and a current asset-to-liability ratio of not less than two to one.

When hiring a middle man the track record is more important than the name

If the acquisition cost exceeds 15 times earnings in cash or stock, buyers often turn away. Other financial figures worth noting are: eroding profit margins—which often stem from strong competitive pressures—and the cost of developing new technologies.

Success or failure in acquisitions or merger often depends on the company that handles the search and negotiations. When hiring that firm an impressive track record is more important than an impressive name. Big-name investment bankers, who are often retained to handle search and negotiations, may have only a superficial knowledge of the equipment and materials industry. They might lack the subtle understanding of how a prospective acquisition complements the operations of a buyer.

Most investment bankers, in fact, are told by their clients which companies to contact and explore for possible acquisitions. For these limited services they often charge hefty con-

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sulting fees. If not an investment banker, what sources are available for searching out possible acquisitions? As a first step, utilize the expertise that's close at hand. Middle managers in most high technology firms have a keen understanding of their company's dynamics. With that insight, they can objectively analyze the strengths and weaknesses of prospective acquisitions. These "in-house" corporate development advisors are a valuable resource and should be consulted in every acquisition undertaking.

Another possibility is to use independent, highly specialized intermediary organizations that have a strong track record in the equipment and materials industry. The role of these firms can be compared to independent geologists that serve the oil industry. Using their in-depth knowledge of the equipment/materials terrain, they have the insight to seek out companies with complementary technology and corporate cultures.

This industry expertise can pay immediate dividends. Most owner/managers of target businesses would rather be contacted initially by someone who shows an understanding of their industry. Never underestimate the value of that first contact.

Controlling Fees

After initial contact with a target company is made, the question of fees often becomes paramount. Through hard negotiating, fees paid to investment bankers, lawyers, accountants and public relations specialists could often be slashed. Some experts believe most fees could be cut up to 80 percent and still generate a hefty profit.

The industry is rife with examples of shoddy fee management. One company recently paid more than $80 million to an investment banking firm to handle a large acquisition. This amount did not include legal or accounting fees, printing costs or in-house support services. Out of pocket expenses, presumably pencils, paper, etc., were all extra.

In another case two firms received $15 million each for authoring four-page opinion letters on the value of a proposed merger. Virtually any senior security analyst could have performed this same service for a small fraction of that amount. In addition to those fees, management should monitor closely the costs for the legal and accounting services. For the most part, they are simply clerical functions. Little originality or creative thought is required to prepare financial or registration statements or to file appropriate documents with government agencies.

The industry is rife with examples of shoddy fee management

Fees charged by smaller, intermediary organizations and consultants, unlike investment bankers, are typically much lower, seldom exceeding 3 percent for transactions less than $10 million. That figure can drop to 2 percent for transactions of $10-50 million. For deals over $50 million, 1 percent is often the standard fee, in addition to out-of-pocket expenses.

Responsibility for negotiating an equitable fee is only one burden faced by top management in a possible merger or acquisition. At the target company of a hostile takeover, management often exhibits difficulty seeing past its own self-interests. In reality, corporate officers are merely "hired hands" who have a fiduciary duty to serve the collective best interests of their stockholders and employees. In fact, most senior officers of major corporations have only token equity interests in their respective companies. They experience little personal loss when they dissipate corporate assets through golden parachutes, takeover defenses or, in acquiring companies, acquisition fees.

It's an unfortunate yet undeniable fact that when a hostile takeover bid is received, management's first reaction is often to develop a strategy to save itself. Examples of this myopic behavior abound. Under the guise of defending corporate independence, executives have saddled their firms with enormous debt while fending off hostile takeovers. In reality, management's duty is to determine the value of the bid as it could benefit the organization as a whole. Their self-interests should not be an issue.

When the Boom Ends

The current boom in mergers, acquisitions and leveraged buyouts should continue as long as high inventories in the computer industry keep pressure on profit margins and sales prospects. Those trends may begin to abate late this spring. Until then, the consolidation of the industry through acquisitions and mergers will spell survival for many undercapitalized firms.

For acquiring companies, the current business environment is an opportunity to buy at bargain prices smaller, creative companies with proprietary product lines.

About the Author

Myron Gackenbach is president of Chemical Markets and Investments Company, an acquisition consulting firm. A former analyst for several investment banking firms, including Bear Stearns and Company, Mr. Gackenbach is a member of the New York Society of Security Analysts and the Pennsylvania Bar Association. ■

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